frontier

Michael J. Shortley, III
Senior Attorney and Director
Regulatory Services

180 South Clinton Avenue
Rochester, NY 14646
716-777-1028
716-546-7823 fax
716-777-6105

mshortle@frontiercorp.com

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DOCKET FILE COPY ORIGINAL

BY OVERNIGHT MAIL

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 98-39

Dear Ms. Salas:

Enclosed for filing please find an original plus twelve (12) copies of the Comments of Frontier Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: Ms. Janice M. Myles

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Competitive Telecommunications Association, Florida Competitive Carriers Association and Southeastern Competitive Carriers Association	)	
	)	**CC Docket No. 98-39**
Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns or Comparable Carriers under Section 251(h) of the Communications Act	)	

COMMENTS OF
FRONTIER CORPORATION

Introduction and Summary

Pursuant to the Commission's Public Notice,[1] Frontier Corporation ("Frontier") submits these comments in partial opposition to the petition of the Competitive Telecommunications Association ("Comptel"), *et al.*[2] regarding the regulatory status of competitive local exchange carrier ("CLEC") affiliates of incumbent local exchange carriers ("ILECs") that operate in the affiliated ILEC's service territory (hereinafter, "affiliated CLECs"). Comptel requests that the Commission declare such affiliated CLECs as successors, assigns or carriers comparable to the ILECs to the extent that

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1 Public Notice, *Commission Seeks Comments on Petition Regarding Regulatory Treatment of Affiliates of ILECs*, CC Dkt. 98-39 (April 1, 1998).

2 *Petition on Defining Certain Incumbent LEC Affiliates as Successors, Assigns or Comparable Carriers under Section 251(h) of the Communications Act,* CC Dkt. 98-39, Petition for Declaratory Ruling or, in the Alternative, for Rulemaking (March 23, 1998) ("Petition").

they utilize common names, share expertise (through employee transfers or the like) and share common sources of capital. Comptel has correctly identified a potentially serious problem -- namely, the potential for ILECs to evade their substantive responsibilities under section 251 of the Communications Act through specially-structured affiliated CLECs in the same area. Nonetheless, Comptel's proposed remedy and the indicia of "evasion" that it proposes are seriously flawed. On this basis, the Commission should deny the Comptel petition. However, since Comptel correctly identifies a potentially serious problem, the Commission should initiate a rulemaking to consider the issue along the lines Frontier suggests below.

First, the shared use of name, expertise and capital provides no basis for the Commission to treat affiliated CLECs differently from any other CLECs. Those are assets that do not belong to the public at large or regulators, much less competitors. To the extent that their use provides an affiliated CLEC with any competitive advantage, that is merely a natural attribute of affiliation, not an inherently anticompetitive attribute.

Moreover, the fact that the affected ILEC transfers its contract service arrangements ("CSAs") to its affiliated CLEC itself says noting about the ability of others to compete with the affiliated CLEC for that class of customer. So long as the underlying piece-parts of the CSA are made available for resale on the same rates, terms and conditions to affiliated and unaffiliated CLECs alike, no discrimination or inherent competitive disadvantages exist.

Second, as a matter of statutory construction, standing alone, the shared use of common resources does not make one affiliate the successor or assign of the other.

Nor, on the basis of the fact pattern proffered by Comptel, could the Commission consider the affiliated CLEC a "comparable carrier."

Third, Frontier agrees that Comptel has identified a potentially serious problem -- the potential for ILECs to evade their obligations under section 251 of the Act. The Commission should initiate a rulemaking to consider the issue. In any such rulemaking, however, the Commission should address the heart of the matter -- the actual ability of an ILEC to evade its section 251 responsibilities. In doing so, the Commission should focus upon whether the ILEC has retained the physical -- *not* intangible -- assets necessary to provide high-quality local exchange service to its competitors, as well as to its retail customers. If the affected ILEC, for example, has transferred significant network assets to its affiliated CLEC, or network investment decisions are decidedly skewed in favor of the affiliated CLEC, legitimate questions regarding regulatory evasion may arise. In the absence of any such behavior, no regulatory question exists.

Argument

I. THE SHARED USE OF NAME, EXPERTISE AND CAPITAL CANNOT OF ITSELF CREATE ANY PRESUMPTION THAT HEIGHTENED REGULATORY IS WARRANTED.

Two themes underline Comptel's petition: (1) name and other corporate resources are "public" assets that may be confiscated for the benefit of competitors; and (2) CSAs of themselves are also public assets that regulatory bodies are free to do with as they will. Both themes are manifestly wrong.

There can be no question that a corporation's assets belong to its shareholders and not to the public at large. As the Supreme Court has long held:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating assets. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of money received for service belongs to the company just as that purchased out of proceeds of its bonds and stock.[3]

By asking the Commission to decree that the use of corporate assets -- particularly *intangible* assets -- purportedly to benefit an affiliated CLEC justifies heightened regulatory scrutiny would turn this principle on its head. Comptel is effectively asking the Commission to declare that a corporation cannot share common resources with an affiliated enterprise because that *might* be detrimental to competitors.[4] That result is plainly contrary to any accepted notions of property rights. As a matter of policy, the overbroad result that Comptel asks the Commission to reach should be rejected. Shared use of common intangible and financial resources is simply one attribute of affiliation; one that is not competitively suspect.[5]

In addition, the purported benefits of affiliation of which Comptel complains are likely largely illusory. The benefits of utilizing a common name, for example, are likely to be realized *outside* the area served by the affected ILEC. At least, the use of the name permits potential customers to know that they are dealing with a large, reputable

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[3] *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32 (1926).

[4] Comptel's evidence in this regard is remarkably weak. It points to various applications of BellSouth Enterprises to operate as a CLEC in various of BellSouth's ILEC service territories. Petition at 3-6. What BellSouth may *expect* and what it may *realize* are two entirely different matters.

[5] *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

organization with whom they may have passing familiarity. *Within* the affected ILEC's service territory, however, the perception that the ILEC is providing inferior service would likely be detrimental to the affiliated CLEC.

Comptel's tandem assertion -- that the transfer of CSAs from the ILEC to the affiliated CLEC also warrants heightened regulatory scrutiny -- is also incorrect. Like other services, CSAs are comprised of a bundle of different services. Merely transferring CSAs from an ILEC to an affiliated CLEC says nothing about the ability of other providers to compete for a particular customer's business. This is particularly true if the affiliated CLEC is purely a resale entity and the ILEC continues to own the underlying facilities. In that circumstance, the underlying piece-parts of any particular CSA are available for resale at wholesale rates to all providers -- affiliated and unaffiliated alike. Unaffiliated providers are able to package the same set of services as the affiliated CLEC by acquiring the piece-parts on the same rates, terms and conditions as the affiliated CLEC in order to offer a comparable CSA. Because the unbundled parts are available for resale, the transfer of package of services to an affiliated CLEC does not present competitive concerns.

More importantly, to the extent that the same rates, terms and conditions are *not* available from the ILEC to both affiliated and unaffiliated CLECs alike, then, absent some extraordinary explanation, the affected ILEC will have directly violated the non-discrimination requirements of section 251 and Comptel's proposed solution is unnecessary.[6]

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[6] As is discussed further in Part III, *infra*, if the affiliated CLEC has been the recipient of significant *physical* -- not *intangible* -- assets such that only the

II. COMPTEL'S CONSTRUCTION OF SECTION 251(h) CANNOT WITHSTAND SCRUTINY.

Comptel asserts that the mere use of common names, personnel and sources of capital makes one entity a successor or assign of another.[7] That assertion is incorrect as a matter of law and the case law that Comptel cites does not support its sweeping assertion.

Section 251(h)(1)(B)(ii) does not define a successor or assign. However, in common parlance, one entity is typically considered a successor or assign of another if it assumes substantially all of the assets or operations of the predecessor company (or at least in the case of an assignees, of those operations directly affected by the assignment at issue). Indeed, the cases cited by Comptel[8] stand for no more startling a proposition. That affiliates share certain common resources in no sense makes one a successor or assign of another. Indeed, the fact that both entities are actively in business simultaneously strongly indicates that, in fact, the contrary is true.

Comptel, secondarily, asserts that the CLEC affiliate that it describes should be treated as a comparable carrier under section 251(h)(2). Yet, an affiliated CLEC as described by Comptel flunks at least the first two tests necessary to support a comparable carrier finding. An affiliated CLEC that shares name, personnel and sources of financing, *without more*, cannot be found to occupy "a position in the market

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affiliated CLEC is able to develop competitive CSAs, a *prima facie* case of regulatory evasion has likely been established. Comptel's approach, however, would not necessarily address this more abusive form of regulatory evasion.

7 Petition at 9-11.

8 *See Id.* at 10 nn. 17-18.

for telephone exchange service within an area that is comparable to the position occupied by [an ILEC]."[9] By definition, the ILEC still exists, still serves the vast majority of customers served by the affiliated enterprises and continues to own the critical network infrastructure.[10]

Similarly, such an affiliated CLEC has not "substantially replaced an incumbent local exchange carrier...."[11] In the circumstances described by Comptel, the ILEC not only still exists in name, but can hardly be said to have been substantially replaced.

Comptel's legal analysis within the narrow fact pattern that it describes is simply incorrect.

III. THE COMMISSION SHOULD, HOWEVER, COMMENCE A RULEMAKING TO CONSIDER POTENTIAL ILEC EVASION OF SECTION 251.

Although Comptel's proposal misses the mark, Comptel does raise an issue of critical importance. The Commission cannot countenance potential evasions of the Act's section 251 requirements through the use of an affiliated CLEC. Any such inquiry, however, must necessarily focus upon the deployment of *physical* network assets or network capabilities. As a result, unless there are other indicia of regulatory evasion, a pure resale affiliated CLEC should presumptively *not* be treated as a successor, assign or comparable carrier under section 251(h). If, in fact, the underlying facilities and services offered by an ILEC are available for resale at wholesale rates to all providers on non-discriminatory terms, no legitimate competitive issues arise.

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9 47 U.S.C. § 251(h)(2)(A).

10 See Part III, *infra.*

11 47 U.S.C. § 251(h)(2)(B).

What potentially should raise concern is the existence of an affiliated, *facilities-based* CLEC that seeks to operate principally in its affiliated ILEC's territory. Here, the potential for regulatory evasion distinctly exists. By transferring switching, transmission or other infrastructure physical assets, including software capabilities, to its affiliated CLEC, or by skewing physical asset investment decisions in favor of the affiliated CLEC, an ILEC so inclined could potentially evade its section 251 obligations.

For example, if physical assets were transferred to the affiliated CLEC or were deployed -- as between the ILEC and its affiliated CLEC -- such that only the affiliated CLEC could offer advanced network services, a case could well be made that the affected ILEC was attempting to evade its section 251 obligations. Such action could support a Commission finding that the affiliated CLEC was a successor, assign or carrier comparable to the ILEC. However, in the narrow circumstances described by Comptel, there would be no basis for any Commission concern, much less, action.

Conclusion

For the foregoing reasons, the Commission should act upon Comptel's petition in the manner suggested herein.

Respectfully submitted,

Michael J. Shortley, III

Attorney for Frontier Corporation

180 South Clinton Avenue
Rochester, New York 14646
(716) 777-1028

April 30, 1998

Certificate of Service

I hereby certify that, on this 30th day of April, 1998, a copy of the foregoing Comments of Frontier Corporation was served by first-class mail, postage prepaid, upon:

David L. Sieradzki
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Michael J. Shortley, III